United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7236

To be argued by
ALLAN S. MOLLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

ALBERT A. CORIOU,

Plaintiff-Appellant,

-against-

FEDERATION OF THE HANDICAPPED and STATE OF NEW YORK DRUG ABUSE CONTROL COMMISSION,

P/S

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
OCT 25 1977
SECOND CIRCUIT

BRIEF FOR DEFENDANT-APPELLEE STATE OF NEW YORK DRUG ABUSE CONTROL COMMISSION

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77 7236

ALBERT A. CORIOU,

Plaintiff-Appellant,

-against-

FEDERATION OF THE HANDICAPPED and STATE OF NEW YORK DRUG ABUSE CONTROL COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE STATE OF NEW YORK DRUG ABUSE CONTROL COMMISSION

Preliminary Statement

This is an appeal from a memorandum opinion and order of the United States District Court for the Southern District of New York (Frankel, J.), dated May 3, 1977, dismissing the complaint against the defendant-appellee Drug Abuse Control

Commission of the State of New York on the grounds that plaintiff-appellant fails to meet the jurisdictional requirements of Title VII of the Court Rights Act of 1964 of filing charges with the Equal Employment Opportunity Commission (EEOC) prior to commencing suit in District Court, and, further, that the complaint fails to state a cause of action upon which relief can be granted. The memorandum opinion is unreported.

Questions Presented

1. Did the District Court err in dismissing the complaint against the defendant-appellee for plaintiff-appellant's failure to file charges with the EEOC prior to commencing suit in District Court?

2. Did the District Court err in dismissing the complaint for failure to state a cause of action upon which relief can be granted?

Statement of the Case

A. Facts.

Plaintiff-appellant applied for a position with the Federation of the Handicapped (hereinafter Federation) pursuant to an advertisement which appeared in the New York Times on November 17, 1975. On November 26, 1975, plaintiff-appellant was interviewed by Mr. Charles Scheps, Program Coordinator at Federation. Subsequent to that interview, Mr. Scheps contacted Mr. George Friedman, who had been plaintiff-appellant's supervisor at the time of plaintiff-appellant's employment with the Drug Abuse Control Commission of the State of New York, since Mr. Friedman's name appeared on the resume plaintiff-appellant had submitted to Federation as an employment reference. Mr. Friedman gave plaintiff-appellant an unfavorable employment reference, which reference was subsequently confirmed in writing.

Plaintiff-appellant was notified by Mr. Charles Scheps by letter of December 17, 1975, that the position had been filled and that he would not be hired.

On January 8, 1976, plaintiff-appellant filed charges against the Federation of the Handicapped with the Equal Employment Opportunity Commission (EEOC) pursuant to

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, alleging that he had been discriminated against on the basis of race and national origin:

> "If, for example, I had all the essential qualifications and there is no reason whatever to believe I did not, which exceeded all of my competitors, but I failed only to qualify on the basis of the national origin variable, to wit Judaic, a clear case of discrimination prevails for which I am entitled to and respectfully request redress." EEOC Affida[illegible], p. 2, Item I, Record on Appeal.

As New York State is a "deferral" State under the statutory scheme,* the EEOC referred the charges to the Human Rights Commission of the City of New York (City Commission) for initial review. The City Commission held a fact-finding conference on February 23, 1976, and on the basis of the testimony and evidence presented there

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* The statute provides that if an agency of a state or political subdivision has been given authority to review employment discrimination cases and others of like nature by state or local law, the EEOC will first afford the authorized agency an opportunity to investigate and make a determination as to the validity of the charges.

determined on April 30, 1976, that there was no probable cause to believe that Federation had engaged in unlawful or discriminatory practice. At plaintiff-appellant's request the determination was reviewed and the April 30, 1976 order affirmed on August 9, 1976.

This determination was referred to the EEOC, who notified plaintiff-appellant on November 26, 1976, that the charge had been dismissed and that plaintiff had a right to sue within 90 days of the receipt of the notice.

Plaintiff-appellant commenced suit on December 26, 1976 in the United States District Court for the Southern District Court of New York (76 Civ. 5657).

B. District Court Proceedings.

Defendant-appellee was made a party for the first time in the suit brought in the District Court. It was never charged before the EEOC with having violated the plaintiff-appellant's Title VII rights and it did not participate in the fact-finding conference conducted by the City Commission on February 23, 1976.

On February 23, 1977, defendant-appellee moved to dismiss on the grounds that a jurisdictional prerequisite to bringing suit in the District Court is a prior charge before the EEOC, and since defendant-appellee had not been so charged, the District Court did not have jurisdiction over defendant-appellee.

On March 29, 1977, the District Court (Frankel, J.) requested a copy of the adverse employment recommendation letter sent to Federation from George Friedman, since plaintiff-appellant placed "primary reliance" upon this letter in establishing his claim that defendant-appellee committed an actionable wrong. "In order to make any judgment about the validity of the plaintiff's position, the court should be supplied with a copy of the letter, upon which he relies, from the Commission to the Federation." (See Memorandum Op., March 29, 1977, Frankel, J., Item No. VII, Record on Appeal).

Defendant-appellee supplied the District Court with a copy of such letter, and on May 3, 1977, the District Court, Frankel, J., dismissed the complaint against defendant-appellee Drug Abuse Control Commission.

The District Court points out near the beginning of its opinion that plaintiff-appellant never claimed that his employment with defendant-appellee was illegally terminated. Rather, he rests his entire case upon the adverse employment recommendation letter which was sent to Federation and which was written long after his termination. He argues, in fact, that the existence of that letter proves that defendant-appellee conspired with Federation to exclude him from the job (he is a native American Catholic of French Canadian extraction) in favor of a Jewish applicant.

The District Court held that the plaintiff-appellant could not mount his case upon such a letter.

> "Obviously, the letter is not itself an act of discrimination within the meaning of Title VII or any other conceivably applicable law. Assuming arguendo the letter was false, it was false only because the termination two years earlier was unlawful, and plaintiff acknowledges in effect that this suit would not lie for that. To hold otherwise would make any limitations period infinitely extendable simply by seeking a new affirmation from the allegedly offending employer." Citation omitted. Memorandum Op., (Frankel, J.) May 5, 1977, Item X Record on Appeal.

Since the defendant-appellee was never made a party to the proceeding before the EEOC, the Complaint against it was dismissed.

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT AGAINST DEFENDANT-APPELLEE DRUG ABUSE CONTROL COMMISSION, SINCE DEFENDANT-APPELLEE WAS NEVER CHARGED BEFORE THE EEOC OR SIMILAR AGENCY, A JURISDICTIONAL PREREQUISITE TO SUIT IN FEDERAL COURT.

Title VII of the Civil Rights Act of 1964 provides specific statutory remedies to an individual who claims that he has been unlawfully discriminated against by an employer or prospective employer on the basis of race, color, religion, sex, or national origin. However, in order for such an individual to obtain relief, he must follow the procedures specified in the act.

Section 2000e-5, 42 U.S.C., the enforcement provision, provides that an aggrieved party shall file charges with the Equal Employment Opportunity Commission (EEOC) within a specified time of the alleged discriminatory

act, and that the Commission shall then proceed to make an investigation and determination on its own, or refer the matter to the appropriate state or local agency for initial determination, according to state or local law.

Once the EEOC finds that the charges brought against a particular respondent are without merit, (as happened here) the Commission:

> "Shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge by the person claiming to be aggrieved...." (emphasis added). 42 U.S.C. § 2000e-5(f)(1).

The Commission dismissed the charges against the Federation and sent it a copy of a Notice of Right to Sue letter. However, the defendant-appellee never received such a letter, since it had never been charged before the EEOC or local agency.

Since being properly charged before the EEOC and being listed as a respondent in the right to sue letter is a prerequisite to federal court jurisdiction, the District Court properly dismissed the complaint against defendant-appellee.

The courts which have heard cases involving Title VII employment discrimination charges have been strict in construing the procedural provisions of the Act. The legislative history of these provisions show that as part of the compromise which made passage of the Civil Rights Act of 1964 possible, the aggrieved parties would be required to resort to state procedures, when available, as a condition precedent to private suit in the federal courts. If a state or other administrative remedy is available, it must be exhausted before the federal charge is filed. Moore v. Sunbeam Corporation, 459 F. 2d 811, 820 (7th Cir. 1972).

Thus, it is well-settled that an aggrieved party does not have a right to sue an individual in federal court without first having charged him before the EEOC or local administrative body. See Mickel v. South Carolina State Employment Service, 377 F. 2d 239 (4th Cir. 1967), cert. denied, 389 U.S. 877; Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967) reversed and remanded on other grounds, 398 F. 2d 496 (5th Cir. 1968); LeBeau v. Libby-Owens-Ford Co., 484 F. 2d 798 (7th Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (7th Cir. 1969).

In Wallace v. International Paper Co., 426 F. Supp. 352 (W.D. La. 1977), the court dismissed the complaint against the union since it had not been charged before the EEOC, noting that the Fifth Circuit had not yet ruled on the issue, while in Thornton v. East Texas Motor Freight, 497 F. 2d 416 (6th Cir. 1974), the court, although not directly ruling upon the point, stated that charging the respondent before the EEOC is a jurisdictional prerequisite to suing in federal court.

See also Presseisen v. Swarthmore College, 71 F.R.D. 34 (E.D. Pa. 1976), where the court dismissed the complaint as to three individuals who had not been charged ~~before~~ before the EEOC.

While this Circuit has taken a flexible stand in interpreting Title VII procedural provisions, Eggleston v. State Univ. at Geneseo, 535 F. 2d 752 (1976), it has never been directly presented with the question of whether or not a party who has never been charged before the EEOC or similar administrative body can be sued in federal court.

Thus, in Weise v. Syracuse University, 522 F. 2d 397 (2d Cir. 1975), where two women employees sued Syracuse University alleging that it had practised sex discrimination against them, the University moved to dismiss on the grounds that the charges were not timely filed with the EEOC. This court held that although the technical provisions of the act had not been followed, plaintiff had met the substantive purposes of the act (the promotion of dispute resolution through accommodation rather than litigation vis-a-vis the EEOC voluntary compliance procedures) and that therefore the District Court should not have dismissed the case. It should be noted that both plaintiffs had actually brought charges before the EEOC. At issue was the timeliness of filing of those charges.

In Goss v. Revlon, 548 F. 2d 405 (2d Cir. 1976), plaintiff filed charges with the EEOC well beyond the statutory time limit and the EEOC dismissed the claim as untimely. The District Court also dismissed and this court

affirmed, since "the failure to file timely charges with the EEOC was, of course, a jurisdictional bar to this proceeding as well," Goss v. Revlon, supra, at 406, citing Weise v. Syracuse University, supra.

Thus, the standard in this circuit in determining whether or not Title VII procedures should be strictly enforced is whether they are merely technical in nature or whether they go to the substance of the Act. Since plaintiff-appellant in the instant case has completely by-passed the EEOC conciliatory mechanisms as they pertain to defendant-appellee, and since this goes to the very heart of the statutory remedy, the District Court's determination in dismissing the case as to defendant-appellee should be upheld. To hold otherwise would be to ignore both the language and legislative history of the Act, as well as to go against the weight of authority.

POINT II

THE ACT OF DISCRIMINATION, IF ANY, OCCURRED AT THE TIME THAT PLAINTIFF-APPELLANT LEFT DEFENDANT-APPELLEE'S EMPLOY, NOT AT THE TIME THAT THE ADVERSE EMPLOYMENT RECOMMENDATION WAS GIVEN, AND THEREFORE A CIVIL SUIT IS BARRED BY THE STATUTE OF LIMITATIONS.

Assuming, arguendo, that plaintiff-appellant has the right to sue a party under Title VII without first bringing charges before the EEOC, plaintiff-appellant still must sue within the period provided by the statute. Since the statute requires that in a deferral state such as New York the charge must be filed with the EEOC within 300 days of the alleged violation, if it is assumed that EEOC review is not a prerequisite to federal jurisdiction it must be presumed that the 300 day limitation period applies to suits brought in the District Court.

Did plaintiff-appellant meet the 300 day limitation? Clearly not, for the alleged act of discrimination, if any, occurred at the time that plaintiff-appellant left his employment with the defendant-appellee, that is, on March 27, 1974, approximately 2 3/4 years prior to bringing suit in federal court and over three times the allowable statutory period.

If plaintiff-appellant felt that he had been unfairly treated in violation of law, his remedy under Title VII was to bring suit against defendant-appellee at the time of his termination of employment on March 27, 1974, not almost three years later on December 20, 1977.

In order for an aggrieved party to successfully bring charges two or three years subsequent to the discriminatory act, said act must be of a continuing nature. Macklin v. Spector Freight Systems, Inc., 478 F. 2d 979 (C.A. D.C. 1973); Cox v. U.S. Gypsum Co., 409 F. 2d 289 (7th Cir., 1969). But when there is only one such act, the time begins to run at the time when the violation occurs, McCarty v. Boeing Co., Inc., 321 F. Supp. 260 (D.C. Wash. 1970).

The date of an employee's discharge or resignation is the controlling date for purposes of determining when an employee must file a complaint with the EEOC, since the termination of employment ends the employment discrimination, Greene v. Carter Carburetor Co., 532 F. 2d 125 (8th Cir., 1976); McCarty v. Boeing Co., Inc., supra.

> "Termination of employment either through discharge or resignation is not a 'continuing' violation. It puts at rest the employment discrimination because the individual is no longer an employee." Olson v. Rembrandt Printing Co., (8th Cir., 1975).

Thus the period of limitation began running from March 27, 1974, and plaintiff-appellant is time-barred from suing in federal court.

The District Court has relied upon National Labor Relations Board v. Childs Co., 195 F. 2d 617 (2d Cir., 1952) in reaching the same conclusion, since, in the words of the District Court, "to hold otherwise would make any limitations period infinitely extendable simply by seeking a new affirmation from the alleged offending employer". (Memorandum Op., supra, p. 3).

Thus plaintiff-appellant fails in his attempts to obtain federal court jurisdiction over defendant-appellee, even if it is assumed that he does not first have to go to the EEOC.

POINT III

THE CHARGES IN THE PRO SE COMPLAINT AGAINST DEFENDANT-APPELLEE, OF CONSPIRING WITH FEDERATION TO DEPRIVE PLAINTIFF-APPELLANT OF HIS CIVIL RIGHTS, CONTAIN NOTHING MORE THAN NAKED ASSERTIONS WITH NO BASIS IN FACT AND ARE INSUFFICIENT TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiff-appellant's attempt to bring defendant-appellee into the fray, by asserting that defendant-appellee entered into a

conspiracy with Federation of the Handicapped to deprive him of his livelihood, is a mere grasping at straws. Plaintiff-appellant has not alleged one fact to show that a Jewish conspiracy existed between the Drug Abuse Control Commission and the Federation of the Handicapped for the purpose of excluding plaintiff-appellant, a native American Catholic of French-Canadian extraction, from obtaining a job with Federation. Indeed, there are no such facts.

As the District Court pointed out, the letter itself is not an act of discrimination within the meaning of Title VII or any other conceivable applicable law. Also see Codd v. Velger, _____ U.S. _____, 45 U.S.L.W. 4175 (February 22, 1977).

It is not unlawful for a past employer to communicate to a prospective employer its employment experience with a job applicant, particularly when the applicant has furnished the prospective employer with the name of the past employer with full knowledge that the latter may be contacted for a reference.

Where, then, is the wrong? Plaintiff-appellant alleges conspiracy. But when the complaint contains nothing more than naked assertions and sets forth no facts upon which such a charge can be grounded, the complaint must be dismissed for failure to state a cause of action. Serzysko v. Chase Manhattan Bank, 461 F. 2d 699 (2d Cir., 1972), cert. den. 409 U.S. 883, reh. den.

409 U.S. 1029. A complaint in a case like this must set forth facts showing some intentional and purposeful deprivation of constitutional rights. Plaintiff-appellant is bound to do more than state vague and conclusory allegations respecting the existence of a conspiracy. He must allege with some degree of particularity overt acts which defendants engaged in which were reasonably related to the claimed conspiracy, Powell v. Workmen's Compensation Board of State of New York, 327 F. 2d 131 (2d Cir., 1964); Birnbaum v. Trussell, 347 F. 2d 86 (2d Cir., 1965).

The letter is not such an act.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DISMISSING THE COMPLAINT AGAINST THE DRUG ABUSE CONTROL COMMISSION OF THE STATE OF NEW YORK MUST BE AFFIRMED.

Dated: New York, New York
October 21, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ALLAN S. MOLLER , ~~being duly sworn, deposes and says~~ affirms under penalty of perjury that he is an Asst. Atty. General in the office of the Attorney General of the State of New York, attorney for Defendant-Appellee herein. On the 24th day of October , 1977 , he served the annexed upon the following named person :

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Attorney in the within entitled Action by personal service and by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Allan S. Moller
Assistant Attorney General

Sworn to before me this
day of October , 1977

Assistant Attorney General
of the State of New York